Clear Water Sanctuary Golf Management Bhd v Ketua Pengarah Perhubungan Perusahaan & Anor

HIGH COURT (IPOH) — APPLICATION FOR JUDICIAL REVIEW NO 25–9 OF 2005
VT SINGHAM J
22 JUNE 2007

Administrative Law — Judicial review — Application for — Ex parte application for leave to apply — Notice of intended objection by Attorney General's Chambers — Whether ex parte application premature — Rules of the High Court 1980 O 53 r 3

Administrative Law — Judicial review — Application for — Test for leave to apply — Threshold stage — Threshold test — Whether sufficient to show prima facie that there was an arguable case which was not frivolous or vexatious — Whether application for leave was procedural or substantive in nature — Whether test the same for opposed and unopposed ex parte application — Rules of the High Court 1980 O 53 rr 1 and 3

Administrative Law — Exercise of administrative powers — Discretion — Leave to apply for judicial review — Flexibility in discretion to consider leave — Discretion to be based on threshold requirement but not to be unduly narrow

Administrative Law — Exercise of administrative powers — Decision or order — Decision making — Leave to apply for judicial review — Whether letter by Director-General amounted to a decision or was mere advice — Director-General may have usurped function of Minister — Process of decision making thus susceptible to judicial review

Civil Procedure — Locus standi — Judicial review — Application for leave partly to determine whether applicant had locus standi

The applicant filed an ex parte application for leave to file for judicial review under O 53 r 3 of the Rules of the High Court 1980 ('the RHC'). The applicant sought relief against an order of the Director-General of Industrial Relations which accorded recognition to the second respondent to represent the applicant's workmen except those in the excepted categories. The applicant also sought a declaration that the workmen of the applicant did not fall within the definition of 'Club Employees'. As required by O 53 r 3(3) of the RHC, the applicant gave notice of its application and served copies of its statement and affidavit on the Attorney General's Chambers ('Chambers'). Senior Federal Counsel for the Chambers served notice of intended objection on the applicant with a copy of the same to the court. The basis for the

objection was that the application for leave was premature as there was no decision made by the Minister under s 9(5) of the Industrial Relations Act 1967 ('the Act'). The applicant countered the argument of the respondents by stating that a decision had been made not by the Minister, but by the Director General of Industrial Relations. Thus, the Director General had usurped the powers of the Minister. The applicant also argued that at the leave stage it was only necessary to show a prima facie case without going into the merits of the case. The respondents replied stating that the application for leave was frivolous and vexatious and that the decision of the Director General was not final. However, the respondents conceded that there was no provision in the Act which allowed the Director General to make the decision complained of by the applicant. The court then asked the respondents counsel whether it was agreed that the applicant was a resort and not a club, to which counsel replied that counsel was not ready to argue on the merits of the case.

Held, allowing the application:

(1) At the leave stage, which is the threshold stage, the court is not to go into substantial issues on merits. All the applicant has to do is to follow the threshold requirement by showing a prima facie case and that the application is not vexatious or frivolous. There must be some substance in the grounds supporting the application (see para 11).

(2) The application for leave is procedural and not substantive and is merely to obtain permission to bring proceedings for judicial review. It is also to ensure that the applicant has locus standi and is not a mere busy body or mischief maker. The only ground for refusal is that the application is frivolous and vexatious (see paras 13 & 15).

(3) The threshold test is the same whether the ex parte application is opposed or unopposed (see para 23).

(4) Discretion to allow the application should be based on the threshold requirement but should not be so narrowed down as to exclude applications for leave, which will frustrate the purpose of judicial review (see para 21).

(5) In the present case the application for leave was not premature as there was a decision made albeit not by the Minister (see para 37).

[Bahasa Malaysia summary

Pemohon telah memfailkan satu permohonan ex parte untuk kebenaran memfailkan semakan kehakiman di bawah A 53 k 3 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Pemohon memohon relif terhadap satu perintah Ketua Pengarah Perhubungan Perusahaan yang memberikan pengiktirafan kepada responden kedua untuk mewakili pekerja-pekerja pemohon kecuali yang terangkum dalam kategori-kategori yang dikecualikan. Pemohon juga memohon satu deklarasi bahawa pekerja-pekerja pemohon tidak terangkum dalam tafsiran 'Club Employees'. Seperti yang dikehendaki oleh A 53 k 3(3) KMT, pemohon telah memberikan notis permohonannya dan menyampaikan salinan-salinan kenyataan dan afidavit tentang Jabatan Peguam Negara ('Jabatan tersebut'). Peguam Kanan Persekutuan bagi pihak

Jabatan tersebut telah menyampaikan notis niat untuk bantahan ke atas pemohon dengan sesalinan yang sama ke mahkamah. Asas untuk bantahan tersebut adalah bahawa permohonan untuk kebenaran itu adalah pra matang kerana tiada keputusan telah dibuat oleh Menteri di bawah s 9(5) Akta Perhubungan Perusahaan 1967 ('Akta tersebut'). Pemohon membalas hujah responden-respodnen dengan mngatakan bahawa satu keputusan telahpun dibuat tetapi bukan oleh Menteri, sebaliknya oleh Ketua Pengarah Perhubungan Perusahaan. Oleh itu, Ketua Pengarah tersebut telah merampas kuasa Menteri. Pemohon juga berhujah bahawa pada peringkat kebenaran hany perlu menunjukkan satu kes prima facie tanpa membincangkan merit kes. Responden-responden menjawab dengan mengatakan bahawa permohonan untuk kebenaran itu adalah remeh dan menyusahkan dan bahawa keputusan Ketua Pengarah itu bukan muktamad. Bagaimanapun, responden-responden mengakui bahawa tiada peruntukan dalam Akta tersebut yang membenarkan Ketua Pengarah membuat keputusan yang diadukan oleh pemohon. Mahkamah kemudian bertanyakan peguam responden-responden sama ada ia bersetuju bahawa pemohon merupakan satu tempat peranginan dan bukan sebuah kelab, yang mana peguam menjawab bahawa peguam belum bersedia untuk berhujah berdasarkan merit kes.

Diputuskan, membenarkan permohonan tersebut:

(1) Di peringkat kebenaran, yang merupakan di peringkat ambang, mahkamah tidak akan membindcangkan isu-isu penting berdasarkan merit. Apa yang perlu dilakukan oleh pemohon adalah untuk mengikut keperluan ambangan itu dengan menunjukkan satu kes prima facie dan bahawa permohonan itu tidak menyusahkan atau remeh. Perlu ada kepentingan dalam alasan menyokong permohonan tersebut (lihat perenggan 11).

(2) Pemohonan untuk kebenaran adalah mengikut prosedur dan tidak penting dan hanya diperoleh untuk mendapatkan kebenaran memulakan prosiding semakan kehakiman. Ia juga untuk memastikan bahawa pemohon mempunyai locus standi dan bukan hanya seorang penyibuk atau pembuat kecoh. Satu-satunya alasan untuk penolakan adalah bahawa permohonan tersebtu adalah remeh dan menyusahkan (lihat perenggan 13 & 15).

(3) Ujian nilai ambang adalah sama iaitu sama ada permohonan ex parte tersebut ditentang atau tidak (lihat perenggan 23).

(4) Budi bicara untuk membenarkan permohonan tersebut hendaklah berdasarkan keperluan nilai ambang itu tetapi tidak patut dibataskan sehingga mengecualikan permohonan untuk kebenaran, yang akan menghalang tujuan semakan kehakiman (lihat perenggan 21).

(5) Dalam kes semasa permohonan untuk kebenaran tidak pra matang kerana terdapat keputusan yang telah dibuat meskipun bukan oleh Menteri (lihat perenggan 37).]

Notes

For cases on application for judicial review, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 191–197.

For cases on discretion, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 24–35.
For cases on decision or order, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 15–16.
For cases on judicial review, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4711–4712.

Cases referred to

Anakku-LSR Baby Products Sdn Bhd v Emporium Jaya (Bentong) Sdn Bhd (formerly known as Jaya Mini Market Sdn Bhd [1994] 4 CLJ 272 (refd)
Arthur Lee Meng Kwang v Faber Merlin Malaysia Bhd & Ors [1986] 2 MLJ 193 (refd)
Association of Bank Officers Peninsular Malaysia v Malayan Commercial Banks Association [1990] 3 MLJ 228 (folld)
Attorney-General of The Duchy of Lancaster v London And North Western Railway Co [1892] CA 274 (folld)
Bandar Utama Development Sdn Bhd & Anor v Lembaga Lebuhraya Malaysia & Anor [1998] 1 MLJ 224 (folld)
Chan Hiang Leng Colin & Ors v Minutes for Information and the Arts [1996] 1 SLR 609 (folld)
Cheah Foong Chiew v Lembaga Jurutera Malaysia [1999] 3 MLJ 110 (distd)
Dato' Ooh Ah Baa @ Boon Pak Leong & Ors v Eagle & Pagoda Brand Teck Aun Medical Factory Sdn Bhd & Ors (No 1) [2004] 2 MLJ 340 (distd)
Dato' Tan Heng Chew v Tan Kim Hor [2006] 2 MLJ 293 (refd)
Dr Amir Hussein bin Baharuddin v Universiti Sains Malaysia [1989] 3 MLJ 298 (folld)
Dr Chandra Muzaffar v University Malaya [2000] 1 MLJ 173 (folld)
Gillick v West Norfold and Wisbech Area Health Authority [1986] AC 112 (folld)
Goh Koon Suan v Heng Gek Kiau [1991] 2 MLJ 307 (refd)
Inland Revenue Commissioner v National Federation of Self-employed and Small Businesses Ltd [1982] AC 617 (folld)
Kaneka Paste Polymers Sdn Bhd v Director General of Industrial Relations & Ors [2005] 7 MLJ 132 (distd)
Kennesion Brothers Sdn Bhd v Construction Workers Union [1989] 2 MLJ 419 (distd)
King, The v Electricity Commissioners [1923] 1 KB 171 (folld)
Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh [1997] 1 MLJ 789 (folld)
M v Homes Office & Anor [1992] QB 270 (refd)
Malayan Banking Berhad v Gan Kong Yam [1972] 1 MLJ 32 (refd)
Miles v New Zealand Alford Estate Co [1880] 32 ChD 266 (refd)
Mohamed Nordin bin Johan v Attorney-General, Malaysia [1983] 1 MLJ 68 (folld)
National Union of Employees in Companies Manufacturing Rubber Products v Director General for Industrial Relations & Anor [1990] 3 MLJ 112 (distd)
National Union of Newspaper Workers v Ketua Pengarah Kesatuan Sekerja [2003] 3 MLJ 689 (distd)
Norman v Mathews [1916] 85 LJK B 857 (refd)
QSR Brands Bhd v Suruhanjaya Sekuriti & Anor [2006] 3 MLJ 164 (folld)
R v Commissioners for the Special Purposes of the Income Tax Acts; ex p Stipple Choice Ltd [1985] 2 All ER 465 (refd)
R v Secretary of State for the Home Department; ex parte Rukshanda Begum (1990) COD 107 (refd)

R v Takeover Panel; ex parte Datafin plc [1977] 2 WLR 699 (refd)
RCA Sdn Bhd v Pekerja-Pekerja RCA Sdn Bhd & Ors [1991] 1 MLJ 309 (distd)
Reg v Secretary of State of Education; ex parte Schaffter [1987] IRLR (refd)
Regina v Chief Constable of the Merseyside Police; ex parte Merril [1989] 1 WLR 1077 (refd)
Republic of Peru v Peruvian Guano Co 36 ChD 496 (refd)
Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2002] 2 MLJ 413 (folld)
Sundralingam v Ramanathan Chettiar [1967] 2 MLJ 211 (refd)
Syarikat Emerald Tiles Sdn Bhd v Menteri Buruh dan Tenaga Rakyat & Anor, Non-Metallic Mineral Products Manufacturing Employees Union (Intervener) Mallal's Digest (4th Ed, 2001 Reissue) (refd)
Tan Chiw Thoo v Tee Kim Kuay [1997] 2 MLJ 221 (refd)
Tan Sri Haji Othman Saat v Mohamed bin Ismail [1982] 2 MLJ 177 (refd)
Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd [1995)] 2 MLJ 442 (folld)
YAM Tunku Dato' Seri Nadzaruddin ibni Tuanku Ja'afar v Datuk Bandar Kuala Lumpur & Anor [2003] 5 MLJ 128 (refd)

Legislation referred to

Industrial Relations Act 1967 ss, 8(2), (2A), (3), 9(3)(a), (4A), (4B) (4C), (5), 12
Registration of Engineers Act 1967
Regulations of Engineers Rules 1972 r 25, Part IV
Rules of the High Court 1980 O 53 rr r 1(1),(3), 2(4), 3(3)
Trade Unions Act 1959 s 26(1A)

Chan Kok Keong (Chan & Associates) for the applicant.
Effendi Nazila bin Abdullah (Senior Federal Counsel, Attorney General's Chambers) for the first respondent.

VT Singham J:

[1] This is an ex parte application (encl 1) by the applicant for leave to file for judicial review under O 53 r 3 of the Rules of the High Court 1980 ('the RHC') seeking the following reliefs:

(i) an order to quash the decision of the first respondent, the Director General of Industrial Relations made on 24 February 2005, according recognition to the second respondent, the Club Employees Union Peninsular Malaysia to represent the workmen except those in managerial, executive, confidential or security capacity employed by the applicant;

(ii) a declaration that the workmen of the applicant do not fall within the scope of the membership of the Club Employees Union Peninsular Malaysia;

(iii) costs in the cause;

(iv) all necessary and consequential directions.

[2] The grounds in support of this application are contained in the statement (encl 2) filed herewith and the affidavit affirmed on 4 April 2005 on behalf of the applicant (encl 3).

Order 53 r 3 of the RHC states:

(i) No application under this order shall be made unless leave therefore has been granted in accordance with this rule.

(ii) An application for leave must be made ex parte to a judge in chambers and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on.

(iii) The applicant must give notice of the application for leave not later than three days before the hearing date to the Attorney General's Chambers and must at the same time lodge in those chambers copies of the statement and affidavits.

(iv) The judge may, in granting leave, impose such terms as to cost and as to the giving of security as he thinks fit.

(v) The grant of leave under this rule shall not, unless the Judge so directs, operate as a stay of the proceedings in question.

(vi) An application for judicial review shall be made promptly and in any event within 40 days from the date when grounds for the application first arose or when the decision is first communicated to the applicant provided that the court may, upon application and if it considers that there is a good reason for doing so, extend the period of 40 days.

[3] The gist and background of the complaint of the application as deduced from the relevant documents for the purpose of this application (encl 1) are as follows:

(i) By a letter dated 8 March 2004, the second respondent served a Notice of claim for recognition on the applicant by Form A dated 1 March 2004 pursuant to s 9(2) of the Industrial Relations Act 1967 ('the Act') in respect of the workmen employed by the applicant, except those in managerial, executive, confidential or security capacity.

(ii) By a letter dated 20 April 2004 the applicant replied to the aforesaid letter dated 8 March 2004 notifying the second respondent for not according recognition of the Club Employees Union Peninsular Malaysia pursuant to s 9(3)(b) of the said Act. The reason stated in the said reply was that trade union is not a competent union to represent their workers as the applicant is registered as a resort and not as a club. By the same letter, the applicant had also applied to the first respondent to determine whether their workmen who have sought recognition were members of the said trade union pursuant to s 9(3)(a) of the said Act.

(iii) By letter dated 24 February 2005, the first respondent notified the applicant of its decision that the applicants' workmen fall within the scope of membership of the said trade union and that the said trade union was competent to represent the said workmen.

[4] Section 9 of the Industrial Relations Act 1967 provides: **A**

9(1) No trade union of workmen the majority of whose membership consists of workmen who are not employed in any of the following capacities that is to say —

(a) managerial capacity;

(b) executive capacity; **B**

(c) confidential capacity; or

(d) security capacity.

may seek recognition or serve an invitation under section 13 in respect of workmen employed in any of the above mentioned capacities.

C

(1A) Any dispute arising at any time, whether before or after recognition has been accorded, as to whether any workman or workmen are employed in a managerial, executive, confidential or security capacity may be referred to the Director General by a trade union of workmen or by an employer or by a trade union of employers.

(2) A trade union of workmen may serve on an employer or on a trade union of employers in writing in the prescribed form a claim for recognition in respect of the workmen or any class of workmen employed by such employer or the members of such trade union of employers. **D**

(3) An employer or a trade union of employers upon whom a claim for recognition has been served shall, within twenty one days after the service of the claim —

(a) accord recognition or **E**

(b) if recognition is not accorded, notify the trade union of workmen concerned in writing the grounds for not according recognition; or

(c) apply to the Director General to ascertain whether the workmen in respect of whom recognition if being sought are members of the trade union of workmen concerned and give a written notice of such application to such trade union o workmen. **F**

(4) Where the trade union of workmen concerned receives a notification under subsection (3)(b) or where the employer or trade union of employers concerned fails to comply with subsection (3) the trade union of workmen may report the matter in writing to the Director General.

G

(4A) The director General, upon receipt of a reference under subsection (1A) or an application under subsection (3)(c), or a report under subsection (4) may take such steps or make such enquiries as he may consider necessary or expedient to resolve the matter.

(4B) For the purposes of carrying out his functions under subsection (4A) the Director General — **H**

(a) shall have the power to require the trade union of workmen, the employer, or the trade union of employers concerned to furnish such information as he may consider necessary or relevant; and

(b) may refer to the Director General of Trade Unions for his decision any question on the competence of the trade union of workmen concerned to represent any workmen or class of workmen in respect of whom recognition is sought to be accorded, and the performance of duties and functions by the Director General of **I**

A Trade Unions under this paragraph shall be deemed to be a performance of his duties and functions under the written law relating to the registration of trade unions.

(4C) Where the matter is not resolved under subsection (4A) the Director General shall notify the Minister.

B (5) Upon receipt of a notification under subsection (4C) the Minister shall give his decision thereon; where the Minister decides that recognition is to be accorded, such recognition shall be deemed to be accorded by the employer or trade union of employers concerned, as the case my be, as from such date as the Minister may specify; a decision of the Minister under this subsection may include a decision as to who are workmen employed in a managerial, executive, confidential or security capacity.

C (6) A decision of the Minister under subsection 9(5) shall be final and shall not be questioned in any court.

[5] The grounds advanced by the applicant to state that the said trade union being the second respondent is not competent to represent the applicant's workmen are as D follows:

(i) The said trade union represents workers in clubs and Associations, whilst the applicants' workmen are employed to work in a hotel and resort and not in a club. A copy of the Rules and Constitution of the said trade union is annexed and marked as YKN-6 to the affidavit (encl 2).

E (ii) There is no similarity in trade, industry and profession between the said trade union and the applicant, as the former represents workers in private and exclusive clubs and associations, whilst the applicant operates a hotel and resort which facilities are available at a price, to all members of the public.

F (iii) Less that 50% of the income of the applicant is derived from the monthly subscription fees collected from the members of the club, whilst more than 50% of the applicant's income is derived from revenue collected from the members of the public for the use of its facilities; a copy of the income statement of the applicant for the years 1999 to 2005 is annexed hereto and marked YKN-7.

G (iv) Accordingly, the decision is wrong in law and in fact and ought to be quashed.

(v) Due to the above stated matters, the applicant has applied for leave to be granted to file an application for a judicial review of the said decision.

H **[6]** As required by O 53 r 3(3) of the RHC the applicant gave notice of the ex parte application for leave not later than three days before the hearing date to the Attorney General's Chambers and at the same time lodged in the chambers copies of the statement and the affidavit. Orders 53 r 3(3) of the RHC states:

I The applicant must give notice of the application for leave not later than three days before the hearing date to the Attorney General's Chambers and must at the same time lodge in those chambers copies of the statement and affidavits.

[7] On 23 April 2007 when the ex parte application (encl 1) came for hearing before this court, learned senior federal counsel ('SFC') for and on behalf of the

Attorney General attended this court. Pursuant to a notice dated 14 July 2005 given to the applicant's solicitors with a copy to the court of an intended preliminary objection to be raised, learned SFC, with the leave of this court raised a preliminary objection against the ex parte application and, inter alia, submitted as follows:

(1) The application for leave is premature as judicial review under O 53 of the RHC can only be made against the decision of the Minister under s 9(5) of the Industrial Relations Act 1968.

Section 9(5) of the Act states:

> Upon receipt of a notification under subsection (4C) the Minister shall give his decision thereon; where the Minister decides that recognition is to be accorded, such recognition shall be deemed to be accorded by the employer or trade union of employers concerned, as the case my be, as from such date as the Minister may specify; a decision of the Minister under this subsection may include a decision as to who are workmen employed in a managerial, executive, confidential or security capacity.

(2) Section 9(1) to 9(4C) of the provides the procedure which ought to be taken by the Director General of the Industrial Relations in respect of an application by the trade union to accord recognition.

Section 9(1) to 9(4C) states:

> 9(1) No trade union of workmen the majority of whose membership consists of workmen who are not employed in any of the following capacities that is to say —
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> (a) managerial capacity;
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> (b) executive capacity;
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> (c) confidential capacity; or
>
> (d) security capacity.
>
> may seek recognition or serve an invitation under section 13 in respect of workmen employed in any of the above mentioned capacities.
>
> (1A) Any dispute arising at any time, whether before or after recognition has been accorded, as to whether any workman or workmen are employed in a managerial, executive, confidential or security capacity may be referred to the Director General by a trade union of workmen or by an employer or by a trade union of employers.
>
> (2) A trade union of workmen may serve on an employer or on a trade union of employers in writing in the prescribed form a claim for recognition in respect of the workmen or any class of workmen employed by such employer or the members of such trade union of employers.
>
> (3) An employer or a trade union of employers upon whom a claim for recognition has been served shall, within twenty one days after the service of the claim —
>
> (a) accord recognition or
>
> (b) if recognition is not accorded, notify the trade union of workmen concerned in writing the grounds for not according recognition; or

(c) apply to the Director General to ascertain whether the workmen in respect of whom recognition if being sought are members of the trade union of workmen concerned and give a written notice of such application to such trade union o workmen.

(4) Where the trade union of workmen concerned receives a notification under subsection (3)(b) or where the employer or trade union of employers concerned fails to comply with subsection (3) the trade union of workmen may report the matter in writing to the Director General.

(4A) The director General, upon receipt of a reference under subsection (1A) or an application under subsection (3)(c), or a report under subsection (4) may take such steps or make such enquiries as he may consider necessary or expedient to resolve the matter.

(4B) For the purposes of carrying out his functions under subsection (4A) the Director General —

(a) shall have the power to require the trade union of workmen, the employer, or the trade union of employers concerned to furnish such information as he may consider necessary or relevant; and

(b) *may refer to the Director General of Trade Unions for his decision any question on the competence of the trade union of workmen concerned to represent any workmen or class of workmen in respect of whom recognition is sought to be accorded*, and the performance of duties and functions by the Director General of Trade Unions under this paragraph shall be deemed to be a performance of his duties and functions under the written law relating to the registration of trade unions.

(4C) Where the matter is not resolved under subsection (4A) the Director General shall notify the Minister

(Emphasis added.)

The power to accord recognition can only be made by the Minister under s 9(5) of the said Act.

(3) The following cases were relied on by the learned SFC in support of the preliminary objection:

(i) *National Union of Employees in Companies Manufacturing Rubber Products v Director General for Industrial Relations & Anor* [1990] 3 MLJ 112;

(ii) *Kennesion Brothers Sdn Bhd v Construction Workers Union* [1989] 2 MLJ 419;

(iii) *National Union of Newspaper Workers v Ketua Pengarah Kesatuan Sekerja* [2003] 3 MLJ 689;

(iv) *Regina v Chief Constable of the Merseyside Police; ex parte Merril* [1989] 1 WLR 1077;

(v) *Syarikat Emerald Tiles Sdn Bhd v Menteri Buruh dan Tenaga Rakyat & Anor, Non-Metallic Mineral Products Manufacturing Employees Union (Intervener)* Mallal's Digest (4th Ed, 2001 Reissue);

(vi) *RCA Sdn Bhd v Pekerja-Pekerja RCA Sdn Bhd & Ors* [1991] 1 MLJ 309;

(vii) *Cheah Foong Chiew v Lembaga Jurutera Malaysia* [1999] 3 MLJ 110; **A**

(viii)*Kaneka Paste Polymers Sdn Bhd v Director General of Industrial Relations & Ors* [2005] 7 MLJ 132.

(4) The final decision whether to accord recognition or not is placed in the Minister under s 9(5) of the said Act. The function of the Director General is only to make inquiries on the membership of the union and is merely an administrative process towards the Minister's final decision. **B**

(5) The application for leave is premature because it is against public policy and militates the intent and spirit of the Act.

(6) This court should not interfere at this stage as the matter has not been decided according to the procedures as stipulated under s 9 of the and until the final decision of the Minister. **C**

(7) Based on the authorities and grounds raised, the application for leave is premature. The application for leave should not be allowed.

(8) In addition to the oral submission, the learned SFC had also handed a copy of written submission and bundle of authorities which includes the cases referred to as above which is marked as encls 11 and 12. **D**

[8] On the other hand, learned counsel for the applicant submitted, inter alia, as follows: **E**

(1) The Act does not give the power to the Director-General to make a decision on the qualification (competence) of the union to represent the workers of the applicant. Such a decision is clearly reserved to the Minister.

(a) The Director General has usurped the function of the Minister. The application for leave is not premature and that the decision by the Director General has legal implication for the applicant. **F**

(b) The application should not be dismissed in limine but proceed to the substantive hearing.

(c) The application for leave is not frivolous or vexatious. **G**

(d) At this leave stage, the court should only be concerned as to whether the applicant has shown a prima facie case and ought not to consider the merits of the case and referred to the following cases:

(i) *Association of Bank Officers Peninsular Malaysia v Malayan Commercial Banks Association* [1990] 3 MLJ 228; **H**

(ii) *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164;

(iii) *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789;

(iv) *Administrative Law* (7th Ed) by Sir William Wale and Christopher Forsyth (which is cited as an authority in courts of law and deals authoritively with the function of the courts in dealing with judicial review). **I**

(v) *The King v Electricity Commissioners* [1923] 1 KB 171;

(vi) *YAM Tunku Dato' Seri Nadzaruddin ibni Tuanku Ja'afar v Datuk Bandar Kuala Lumpur & Anor* [2003] 5 MLJ 128.

[9] In reply, learned SFC submitted as follows:

(i) Disagreed with the contentions of the learned counsel for the applicant on the duty of the court at this stage of the application for leave as explained in the cases cited.

(ii) the application for leave is frivolous and vexatious.

(iii) The decision of the Director General is not final. It is only a decision on the enquiries of the competence of the membership under s 9(4C) of the.

(iv) Referred to s 9(4B) of the which provides the powers of the Director General. In any event, he conceded that there is no express provision for the Director General to make the decision as contained in the said letter dated 24 February 2005 (exh YKN-5).

(v) If the applicant is not satisfied with the decision of the Director General, the applicant can bring this matter to the attention of the Minister under s 9(5) of the Act.

(vi) However, he conceded that there is no provision in the for the applicant to appeal to the Director General for the matter to be referred to the Minister.

[10] Further Submission of learned counsel for the applicant:

Even if the Director General has the jurisdiction to make the decision on the competency of the union that itself is an error of law and this court can grant leave to hear the substantive application.

Mahkamah (kepada SFC bagi responden):

Soalan: Do you agree that the applicant is registered as a resort and not as a club?

SFC:

Jawapan: Saya tidak bersedia untuk hujah atas merit.

Peguam bagi Pemohon:

The question clarified by Your Lordship, I am keeping it for the substantive application which will be argued on the merits.

DECISION

[11] It is important to note that at this leave stage of the proceedings, this court is not to embark on substantial issues on merits. All that the applicant need to show for leave to be granted as enshrined in O 53 of the RHC is there is a prima facie case as laid down by the number of case laws and that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application (see *Kamaruzaman Khalid v YB Menteri Sumber Manusia* at p 241 which had

dutifully followed the threshold requirement as laid down in *Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Bank Association*). A

[12] In *Association of Bank Officers Peninsular Malaysia v Malayan Commercial Banks Association* [1990] 3 MLJ 228, Ajaib Singh SCJ (delivering the judgment of the court) said at p 229: B

> At the outset of the hearing of the appeal before us we indicated to the parties that we would hear submissions on the issue of leave only. After giving due consideration to the evidence in this case and the submissions advance by the parties we were of the view that leave to apply for an order of certiorari ought to have been given. In his grounds of judgment the learned Judicial Commissioner had gone further than the leave stage and embarked on substantial issues on merit. We did not think that this was the right approach when the application for leave to apply for an order of certiorari is made. *The guiding principle ought to be that the applicants must show prima facie that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application.* On the evidence in this case we found that the appellants had prima facie an arguable case for the granting of the relief they were seeking. Their application was not frivolous or vexatious. There were grounds to consider the allegations made by the appellants and which could only be properly heard and determined on the substantive application for an order of certiorari after leave has been granted. (Emphasis added.)

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[13] The application for leave as spelt out in O 53 r 1(1) and (3) of the RHC is procedural in nature unlike the substantive relief which is sought if leave is granted. The approach in an application for leave under O 53 r 1(3) of the RHC is merely to obtain permission to bring the proceedings by way of judicial review and the onus is on the applicant to actually show or demonstrate a prima facie case. It is essentially akin to a vetting process, first, to ensure that the applicant has a locus standi and is not a mere busy body or 'mischief maker' which does not have sufficient interest to challenge the decision or the process of the decision making by way of judicial review and secondly, the applicant has demonstrated a prima facie case for leave to be granted. E

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[14] This process for leave is conducted ex parte although r 3 sub-r 3 of O 53 of the RHC requires the applicant to give notice of the application to the Attorney General's Chambers and at the same time to lodge in those Chambers copies of the statement and affidavits. Accordingly, it is important to reiterate at this stage that the hearing of the ex parte application for leave is not an adjudication on the merits of the case or in the real sense of the word (see *Arthur Lee Meng Kwang v Faber Merlin Malaysia Bhd & Ors* [1986] 2 MLJ 193 at p 196). G

H

[15] It is settled law that leave to apply for an order to file proceedings for judicial review should not be refused unless the application is frivolous or vexatious. In other words, the sole questions at the leave stage is whether the application is frivolous (per Gopal Sri Ram JCA in *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164; [2006] CLJ 532 at p 537). Frivolous or vexatious action or statement is generally referred to as groundless action or statement with no prospect of success or wanting in bona fide or when it is not calculated to lead to any practical result. It is often raised to embarrass or annoy the other party to the action (see *Attorney-General* I

of The Duchy of Lancaster v London And North Western Railway Co [1892] CA 274), *Malayan Banking Berhad v Gan Kong Yam* [1972] 1 MLJ 32 at p 33; *Goh Koon Suan v Heng Gek Kiau* [1991] 2 MLJ 307 at p 311). In*Republic of Peru v Peruvian Guano Co 36 ChD 496* Chitty J said:

> … the pleading will not be struck out unless it is demurrable and something worse than demurrable. If, notwithstanding defects in the pleading, which would have been fatal on a demurrer, the court sees that a substantial case is presented the court should, I think, decline to strike out that pleading; but when the pleading discloses a case which the court is satisfied will not succeed, then it should strike it out and put a summary end to the litigation.

[16] In *Attorney-General of The Duchy of Lancaster v London And North Western Railway Co* [1892] CA 274 at p 278 AL Smith LJ said:

> It seems to me that when there is an application made to strike out a pleading, and you have to go to extrinsic evidence to show that the pleading is bad, that rule does not apply. It is only when upon the face of it is shown that the pleading discloses no cause of action or defence, or that it is frivolous and vexatious, that the rule applies. In this case it is manifest that you must go to extrinsic evidence to show that the pleading is bad, and directly it comes to that, the rule does not apply.

(See *Anakku-LSR Baby Products Sdn Bhd v Emporium Jaya (Bentong) Sdn Bhd (formerly known as Jaya Mini Market Sdn Bhd* [1994] 4 CLJ 272, *Tan Chiw Thoo v Tee Kim Kuay* [1997] 2 MLJ 221 at p 233, and *Miles v New Zealand Alford Estate Co* (1880) 32 ChD 266 at p 291) where it was referred to and applied in *Tan Chiw Thoo v Tee Kim Kuay* by the Federal Court). Bowen LJ in *Miles v New Zealand Alford Estate Co* said:

> It seems as to me that if an intending litigant bona fide forbears a right to litigate a question of law or fact which is not vexatious or frivolous to litigate, he does give up something of value. It is a mistake to suppose it is not an advantage, which a suitor is capable of appreciating, to be able to litigate his claim, even if he turns out to be wrong. It seems to me, it is equally a mistake to suppose that it is not sometimes a disadvantage to a man to have to defend an action even if in the end he succeeds in his defence; and I think therefore that the reality of the claim which is given up must be measured, not by the state of the law as it is ultimately discovered to be, but by the state of the knowledge of the person who at the time has to judge and make the concession. Otherwise, you would have to try the whole cause to know if the man had a right to compromise it, and with regard to questions of law, it is obvious you could never safely compromise a question of law at all.

[17] On the other hand, there is an inherent power in every court to stay or dismiss actions or applications which are frivolous and vexatious and abuse of the process of the court. In order to bring a case within the description it is not sufficient merely to say that the applicant has no cause of action. It must appear that his alleged cause of action is one which on the face of it is clearly one which no reasonable person could properly treat as bona fide, and contend that he had a grievance which he was entitled to bring before the court (see *Norman v Mathews* [1916] 85 LJK B 857 at p 869, per Lush J). Another reason for leave would go a long way in assuring that only the exceptional case firmly grounded on the threshold test would become the subject of the application for leave. It is for this reason that it becomes the duty of the court to ensure that the availability of the remedy of judicial review is not abused

and the application is subject to critical examination by the court at the permission stage of a possible claim for such judicial remedy.

[18] However it must be pointed out that the Court of Appeal in *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164 at p 170 (CA) upheld the decision of the High Court in refusing leave on the ground that the applicant lacked the threshold standing in that, the applicant was not a person 'adversely affected' within r 2(4) of O 53 of the RHC and 'lacks a sufficient personal interest in the legality of the impugned action'. In fact, his Lordship Gopal Sri Ram JCA said that:

> Historically speaking, the requirement of standing to approach a court for judicial review was one that was established by the courts to keep out litigants who had no legitimate grievance against the administrative arm of the State. The object was to prevent them from crossing the threshold of the courts of justice. This requirement established by judges for themselves that only those with a legitimate grievance may cross the threshold and enter the court is what is known as 'threshold locus standi' It is quite different from the doctrine of 'substantive locus standi' which falls to be determined by court at the very end of the case when it comes to decide whether on the facts and circumstances discretion ought to be exercised in the applicants favour (see *Tan Sri Haji Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177).

[19] Be that as it may, it is also relevant to quote the passage of Lord Diplock in *Inland Revenue Commissioner v National Federation of Self-employed and Small Businesses Ltd* [1982] AC 617 referred to an relied on in *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164 at p 172, where Lord Diplock said:

> The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application.

In *Inland Revenue Commissioner v National Federation of Self-Employed And Small Business Ltd*, Lord Diplock observed:

> The procedure under the new O 53 involves two stages: (1) the application for leave to apply for judicial review, and (2) if leave is granted, the hearing of the application itself. The former, or 'threshold', stage is regulated by r.3. The application for leave to apply for judicial review is made initially ex parte, but may be adjourned for the persons or bodies against whom relief is sought to be represented. This did not happen in the instant case. Rule 3(5) specifically requires the court to consider at this stage whether 'it considers that the applicant has a sufficient interest in the matter to which the application relates'. So this is a 'threshold' question in the sense that the court must direct its mind to it and form a prima facie view about it on the material that is available at the first state. The prima facie view so formed, if favourable to the applicant, may alter on further consideration in the light of further evidence that may be before the court at the second stage, the hearing of the application for judicial review itself.
>
> The need for leave to start proceedings for remedies in public law is not new. It applied previously to applications for prerogative orders, though not to civil action for injunctions

A or declarations. Its purpose is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.

B

[20] In *Mohamed Nordin bin Johan v Attorney-General, Malaysia* [1983] 1 MLJ 68, Raja Azlan Shah Ag LP (as His Highness then was) said at p 70:

We allowed the appeal and granted the appellant leave to apply for an order of certiorari because we are of the view that the learned judge was wrong in refusing leave as the point
C taken was not frivolous to merit refusal of leave in limine and justified argument on a substantive motion for certiorari. When this court grants leave, it has jurisdiction to hear the substantive motion itself.

[21] Courts are the guardians of individual rights and not mere upholders of law.
D Therefore, the court ought to be allowed greater powers and flexibility when exercising its discretion to consider leave applications for judicial review according to the needs of the particular case where there is some infringements or encroachment gravely on the individual but subject of course to meeting the threshold requirement as stated above. Nevertheless, it is important to stress at this stage that the threshold
E requirement or guiding principles for leave to seek judicial review should not be narrowed down to a ridiculous extreme edge by including additional species than what is required of the present state of law so as not to impose or place undue burden or shackles on applicants to such an extent that it may eventually frustrate the object of the procedural rules for seeking leave by an ex parte application or seen as diluting the judicial discretion (see *Chan Hiang Leng Colin & Ors v Minutes for Information*
F *and the Arts* [1996] 1 SLR 609 at p 616, *R v Commissioners for the Special Purposes of the Income Tax Acts; ex p Stipple Choice Ltd* [1985] 2 All ER 465 Lord Ackner LJ at p 470 said:

In granting this leave we must of course stress that we are doing no more than giving the applicant an opportunity to apply for judicial review in respect of the commissioner's
G decision. It may well turn out on the hearing that his decision was neither arbitrary nor capricious and that there was a proper basis for it.

[22] In *Dr Amir Hussein bin Baharuddin v Universiti Sains Malaysia* [1989] 3 MLJ 298 Edgar Joseph Jr. J (as he then was) at p 299 said:

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I approach this application by reminding myself that under O 53 r 3, the court exercise discretion whether to grant leave to apply for judicial review. The court is here first looking only at the ex parte application and is concerned to see whether prima facie there is a genuine case for review.

I Be that as it may, whether the applicant alone or both parties are heard in an application for leave, the threshold test is the same: Does the applicant have an arguable case for review, a sufficient interest and has there been undue delay? I had, in the course of the hearing, to remind counsel more than once, to keep the first of these points in the forefront of their minds because of the somewhat emotive arguments addressed to me as though the application were at a full hearing after leave granted.

[23] It is to be noted that whether the application is heard ex parte as provide by the rules of the court or as an opposed ex parte, the threshold test is the same ie: Does the applicant have an arguable case or has shown a prima facie case for review, a sufficient interest and there has been no undue delay? The status of hearing for leave by the applicant has not changed despite the preliminary objection by learned SFC and the application remains and is heard as an opposed ex parte. See *Dr Chandra Muzaffar v University Malaya* [2000] 1 MLJ 173 Azmel J (as he then was) at p 176 said:

> At the outset I must point out that the application for leave by the applicant before me was an ex parte application. The status of the hearing of such application had not been changed even though I have invited the representative from the Attorney General's Chambers and counsel for the respondent to appear and submit before me. The reason why I invited the representative from the Attorney General's Chambers and the counsel for the respondent was to seek their views on a specific legal issue ie whether this court can proceed to hear the applicant's application. Hence the appearance of the senior federal counsel and the respondent's counsel before me was at my invitation in the capacity as amicus curie.

[24] In *Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd* [1995)] 2 MLJ 442 Edger Joseph Jr FCJ had relied and referred to *R v Secretary of State for the Home Department; ex parte Rukshanda Begum* (1990) COD 107, where the Court of Appeal in England had laid down guidelines to be followed by the court when considering an application for leave, in the following terms:

> (i) The judge should grant leave if it is clear that there is a point for further investigation on a full inter parties basis with all such evidence as is necessary on the facts and all such argument as is necessary on the law.
>
> (ii) If the judge is satisfied that there is no arguable case he should dismiss the application for leave to move for judicial review.
>
> (iii) If on considering the papers, the judge comes to the conclusion that he *really does not know whether there is or is not an arguable case, the right course is for the judge to invite the putative respondent to attend and make representations as to whether or not leave should be granted. That inter parties leave hearing should not be anywhere near so extensive as a full substantive judicial review hearing.* The test to be applied by the judge at that inter parties leave hearing should be analogous to the approach adopted in deciding whether to grant leave to appeal against an arbitrator's award, … namely: if, taking account of a brief argument on either side, the judge is satisfied that there is a case fit for further consideration, then he should grant leave. (Emphasis added.)

[25] The principles on granting leave for judicial review are well settled and there should be no room for any turmoil to curb certainty in law and bang against the weight of the settled principles. Any other requirement or a higher threshold would be to divert or deflect from a regular course of the settled principles or certainty through precedent principles as this may result in judicial loggerheads and result in uncertainly in law. In other words, the court should not impose or demand a higher threshold than that of an arguable or a prima facie case. The threshold for leave in this jurisdiction have existed and followed in one form or another as laid in *Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association* case and this court is bound by the ratio decidendi in that case (see *QSR*

Brands Bhd v Suruhanjaya Sekuriti & Anor [2006] 3 MLJ 164; 2006 2 CLJ 532 at p 542 and *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293).

[26] The factual matrix in the instant case as stated above case does not at this stage exclude the jurisdiction of this court to grant leave. The applicant need not also have to wait until the Minister has made the decision as the letter dated 24 February 2005 (exh YKN-5) from the Director General itself states of a decision where it is clearly stated as follows:

> 2. Dimaklumkan bahawa satu penyiasatan mengenai isu kelayakan telah dijalankan oleh Jabatan Hal Ehwal Kesatuan Sekerja Malaysia dan *didapati* bahawa pekerja-pekarja yang digaji oleh Clear Water Sanctuary Golf Management Berhad adalah termasuk di dalam skop keahlian kesatuan Pekerja-Pekerja Kelab Semenanjung Malaysia. Oleh yang demikian, *adalah diputuskan* bahawa kesatuan Pekerja-Pekerja Kelab Semenanjung Malaysia *layak* mewakili pekerja-pekerja syarikat. (Emphasis added.)

It is clear and plain from the correspondence and the letter dated 24 February 2005 (exh YKN-5) that there has been a considered decision by the Director-General who informed the applicant that the said workmen fell within the scope of the membership of the trade union and that the second respondent was competent to represent the said workmen of the applicant. There is no doubt that the Director-General had in fact taken an official and considered decision, in the sense of making up his mind and communicating his considered view to the applicant. It is therefore of the respectful view of this court that the letter dated 24 February 2005 (exh YKN-5) does constitute a decision and not an advice notwithstanding that the Director General may have usurped the function of the Minister and that is a decision or process of decision making susceptible justiciable of judicial review (see *Gillick v West Norfold and Wisbech Area Health Authority* [1986] AC 112 at p 193; *Reg v Secretary of State of Education; ex parte Schaffter* [1987] IRLR; and *R v Takeover Panel; ex parte Datafin plc* [1977] 2 WLR 699)

[27] The proper constitutional relationship of the executive with the courts is that the courts will respect all acts of the executive within its lawful province, and that the executive will respect all decisions of the courts as to what its lawful province is and act in the spirit of the court's order (see *M v Homes Office & Anor* [1992] QB 270 at p 314 per Nolan LJ). Accordingly, any trial of strength between any aggrieved party and the public authority or a decision maker as in the instant case will have to be fought most fiercely on the battleground of the substantive application of the judicial review where the court will consider the merits of the case.

[28] In the instant case, this court finds that the applicant has complied with all the procedural requirements as enshrined in O 53 of the RHC to obtain leave and the court today should be flexible in its approach when dealing with such an application according to the needs of the particular case. So long as the procedural requirements under O 53 of the RHC has not been flouted or the procedures are not misused, this court has the jurisdiction to deal with the complaint in the substantive application. The administration of justice cannot afford to operate on the basis of stereotypes and neither can there be or adopt a standard setting to resolve disputes but on settled principle according to the facts and circumstances of each case by applying the settled

principles for leave to be granted (see *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293). As the applicant has demonstrated a prima facie case, this court should not just refuse the application according to its whims or in limine. On the other hand, the requirement for leave should not be granted merely as a formality in the sense that every application sought for judicial review ought to be granted as matter of course or is axiomatic. In *Bandar Utama Development Sdn Bhd & Anor v Lembaga Lebuhraya Malaysia & Anor* [1998] 1 MLJ 224 Visu Sinnadurai J at p 239 said:

> the granting of leave is not a mere formality. The need for leave is to filter the cases that would otherwise proceed for a full hearing and referred to *Judicial Remedies in Public Library*, Sweet and Maxwell (1992) by Clive Lewis at p 230 where it is stated:
>
> > The requirement of leave is designed to filter out applications which are groundless or hopeless at an early stage. The purpose is: '… to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error and to remove the uncertainty in which public … authorities might be left …'. As such, the aim is to prevent a wasteful use of judicial time and to protect public bodies from the harassment (intentional or otherwise) that might arise from the need to delay implementing decisions, where the legality of such decisions has been challenged. The leave requirement also enables an individual to obtain a quick and relatively cheap judicial consideration of whether his case has any prospect of success (see *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2002] 2 MLJ 413 at p 423).

[29] This court cannot be seen to whittle down the threshold or judicial discretion on the application for leave to a ridiculous extreme edge notwithstanding that in the instant case, it is indeed an opposed ex parte application (see *Dato' Ooh Ah Baa @ Boon Pak Leong & Ors v Eagle & Pagoda Brand Teck Aun Medical Factory Sdn Bhd & Ors (No 1)* [2004] 2 MLJ 340). This court cannot be asked to apply the case in *Kaneka Paste Polymers Sdn Bhd v Director General of Industrial Relations & Ors* [2005] 7 MLJ 132 and ouster the court's jurisdiction or discretion to refuse leave so long as the scope and limits if the application for leave are not abused which is not the case in the instant case.

[30] The decision in *National Union of Employees in Companies Manufacturing Rubber Products v Director General for Industrial Relations & Anor* [1990] 3 MLJ 112 cited by learned SFC has no relevance to the application under O 53 of the RHC. In that case, the plaintiff's application was for various declarations and interpretation of s 12 of the Act. In fact, the decision in that case supports the contention of learned counsel for the applicant that the Director General had usurped the function of Minister. Wan Adnan J (later President of the Court of Appeal) at p 113 said:

> In my view, the Director General is not supposed to make a decision on the matter. He cannot decide whether or not to accord recognition. The power to accord recognition is only given to the employer under s 9(3) (a) or the Minister under s 9(5). The most the Director General can do to resolve the matter under sub-s (4A) is (after exercising his powers under sub-s (4B) to advise the employer to accord recognition. If the advice is accepted and recognition is accorded the matter is resolved under sub-s (4A). Other wise the matter is not resolved and has to be referred to the Minister for his decision.

(See *Kennesion Brothers Sdn Bhd v Construction Workers Union* [1989] 2 MLJ 419 at p 421). The decision in *Kennesion Brothers Sdn Bhd v Construction Workers Union*)

cited by learned SFC is also not relevant to the application for leave. In that case, the issue was, whether the appellant employer who had accorded recognition to the respondent/trade union under s 9(3)(a) of the Act could revoke or withdraw such recognition unilaterally on account of an earlier decision of the Registrar who had held that the respondent/union was not competent to represent the workmen employed in the business of the appellant/employer in regard to a distinct and separate application for recognition.

[31] The decision in *National Union of Newspaper Workers v Ketua Pengarah Kesatuan Sekerja* [2003] 3 MLJ 689 cited by learned SFC was in reference to two questions posed for the decision of the Federal Court against the decision of the Court of Appeal. The two questions posed were:

(a) Whether s 26(1A) of the Trade Unions Act 1959 can be applied by the Director-General of Trade Union to render the entire membership of the union in the respondent companies not eligible and the union incompetent to represent the entire membership? and

(b) Whether s 26(1A) of the Trade Unions Act 1959 can be invoked and applied to the de facto derecognize a union and disunionize members when it is admitted that nothing has changed in respect of the establishment trade, occupation or industry concerned? It is therefore clear that the facts in *National Union of Newspaper Workers v Ketua Pengarah Kesatuan Sekerja* are poles apart and has no relevance to the application for leave in the instant case.

(c) The facts in the *Regina v Chief Constable of the Merseyside Police; ex parte Merril* [1989] 1 WLR 1077 cited by learned SFC can be easily distinguished when compared to the facts in the instant case. In that case, the decision of the Court of Appeal was against the decision of the Divisional Court on the merits of the substantive hearing for judicial review after leave to apply was granted unlike the instant case, first, where leave is sought to apply for judicial review, secondly, the applicant a detective police constable in that case had sought judicial review of the refusal by his Chief Constable to discontinue an inquiry into a disciplinary offence alleged to have seen committed by him It is in those context Lord Donaldson MR at p 1088 said:

> It must be even rarer to have a situation in which judicial review should even be considered before a Chief Constable has reached a final decision on the complaint, if indeed one can be imagined. Normally, the time for judicial review would not arise, if at all, before the appeal tribunal had given its decision

[32] Therefore, it is the respectful view of this court that the said speech in *R v Chief Constable* referred to by learned SFC has been taken out of context and read in isolation without considering the facts and circumstance of that case which has no relevance to the facts in the instant case where the Director General had in fact made a decision as contained in the letter dated 24 February 2005 (exh YKN-5).

[33] The facts in *Syarikat Emerald Tiles Sdn Bhd v Menteri Buruh dan Tenaga Rakyat & Anor, Non-Metallic Mineral Products Manufacturing Employees Union (Intervener)* Mallal's Digest (4th Ed, 2001 Reissue) cited by learned SFC are also

poles apart when compared to the facts in the instant case. In that case, the applicant/employer refused to accord recognition that was granted by the Director General of Industrial Relations to the intervener to represent the workmen. As the matter would not be resolved under s 9(4A) of the Act, the Director General of Industrial Relations referred the matter to the Minister, who, acting under s 9(5) of the Act, decided that the applicant was to award recognition to the intervener. In the circumstances, the applicant in that case sought to have the decision quashed by way of certiorari which is not the same as in the instant case.

[34] The facts and the law applied in *RCA Sdn Bhd v Pekerja-Pekerja RCA Sdn Bhd & Ors* [1991] 1 MLJ 309 cited by learned SFC is not relevant to the facts and the law applied in the instant case. In that case, the first respondent, a trade union had applied ex parte for an interim injunction, namely, to restrain the appellants from preventing or interfering with the trade union or their agents or servants in distributing union membership forms and collecting union dues from employees of the appellants in all three shifts during their non-working hours on the appellant's premises until after the hearing of the action or the disposed by the Industrial Court of the complaint by the trade union. In fact, the respondents in that case had earlier filed an original summons seeking various declarations and injunction against the appellants. The learned judge had granted the ex parte injunction. The appellants application to have the injunction dissolved was dismissed by the learned judge. The appellants/employees appealed to the Supreme Court against that part of the decision. The Supreme Court, inter alia, held that since the respondents had lodged a formal complaint under s 8 of the Industrial Relations Act 1967 with the Director General and none of the steps or decision as provided under sub-ss (2), (2A) and (3) has been taken which provided adequate remedy under the law for the respondents to pursue, the High Court should not have interfered at that stage by granting the ex parte injunction as the grant of the injunction has predetermined the issues which are to be determined by the Minister and the Industrial Court. Once again the facts and the law applied in that case has been taken out of context and misapplied in this instant case.

[35] The case *Cheah Foong Chiew v Lembaga Jurutera Malaysia* [1999] 3 MLJ 110 referred to by learned SFC has no application to the facts in the instant case. The argument of learned SFC is based on a misconception on the word premature as applied in that case. In that case, disciplinary proceedings was initiated against the appellant, a registered director engineer under r 25 of Part IV (Code of Professional Conduct) of the Regulations of Engineers Rules 1972 by the Board of Engineers established under the Registration of Engineers Act 1967. However, before the disciplinary proceedings could commence, the appellant applied to the High Court by originating summons seeking a declaration on the jurisdiction of the Board and also a prohibitory injunction to prevent the said Board from investigating against him. The High Court had dismissed the originating summons. Hence, the appeal to the Court of Appeal. In dismissing the appeal, Shaik Daud JCA delivering the judgment of the court held inter alia that the appellant's application to the court was premature as the normal rule is not for the court to intervene but to allow the domestic tribunal, in that case, the said Board to proceed and decide the matter and it would pre-empt the said Board's right under the raw to adjudicate the matter.

Therefore, the Court of Appeal in that case had held that it was premature for the court to injunct the said Board in exercising their powers.

[36] The case *Kaneka Paste Polymers Sdn Bhd v Director General of Industrial Relations & Ors* [2005] 7 MLJ 132 relied upon by learned SFC can first, be distinguished and secondly, it is not binding upon this court which of co-ordinate jurisdiction, although judicial courtesy naturally requires that they do not lightly dissent from their considered opinions of their brethren (see *Sundralingam v Ramanathan Chettiar* [1967] 2 MLJ 211 at p 213).

[37] This court with respect wish to distinguish the facts in *Kaneka Paste Polymers Sdn Bhd* as first, the contents of the letter dated 29 March 2003 from the Director General of Industrial Relations in that case has not been disclosed, secondly, the letter dated 24 February 2005 (exh YKN-5) from the Director General in the instant case, expressly states the said workmen of the applicant came within the scope of the membership of trade union and that in the circumstances, it has been decided that the said Union were competent or qualified to represent the said workmen, thirdly, it is nowhere stated in the said letter dated 24 February 2005 (exh YKN-5) that the decision of the Minister is awaited or the process for the union's recognition is midway before the decision of the Minister, fourthly, the contention on behalf of the applicant in that case was the Director General was the only person who have the power to make such decision which is not the contention of learned counsel for the applicant in the instant case, fifthly, the said letter dated 24 February 2005 (exh YKN-5) did not state the mater is not resolved and that the Director General has notified the Minister, sixthly, nowhere in O 53 of the RHC it is stated that the decision which is subject to be reviewed must be the decision of the Minister under s 9(5) of the Act. Accordingly this court is of the respectful view that the application for leave in the instant case is not premature and the decision of the Director General as contained in the letter dated 24 February 2005 (exh YKN-5) is amenable to judicial review and the merits of its power is a matter to be argued at the substantive hearing of the judicial review and is in fact premature to determine that power or to discuss issues pertaining to the merit of the application at this leave stage (see *Dr Chandra Muzaffar v Universiti Malaya* [2000] 1 MLJ 173 at p 178)

[38] In the circumstances, the facts of the cases referred to by learned SFC in support of his preliminary objection to this application for leave can be readily distinguishable from the facts in the instant case as distinguished above and with profound respect is not followed. The end result should be, not a matter of what is but of what ought to be. To that extent leave ought to be granted to the applicant. However, this court is mindful that 'it is equally important that the courts do not use or misuse the weapon of judicial review' by exercising its discretion according to its judicial whims.

[39] On the totality of the facts and circumstances in the instant case, this court is satisfied that the application for leave in the instants case is within the scope of the threshold for granting leave as provided under O 53 r 3 of the RHC and the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application and that leave ought to be granted. Each case

however must be considered on it's own facts and it would be quite unwise to attempt the formulation of an all-embracing rule (see *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789 at p 791.).

[40] Accordingly, leave is granted to the applicants and order in terms of the application (encl 1).

Application allowed.

Reported by Daphne Sebastian